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No. 03-1174

Supreme Court, U.S.
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In The
Supreme Court of the United States

MICHELLE NORTON and JOHN NORTON, JR.,

Petitioners,

v.

DEBORAH HALL, COUNTY OF CUMBERLAND and CUMBERLAND COUNTY SHERIFF'S DEPARTMENT,

Respondents.

On Petition For Writ Of Certiorari To The Maine Supreme Judicial Court

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

JOHN J. WALL, III, ESQ.
Counsel of Record for Respondents Cumberland County and Cumberland County Sheriff's Department

MONAGHAN LEAHY, LLP
95 Exchange Street
P.O. Box 7046
Portland, Maine 04112-7046
(207) 774-3906

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QUESTIONS PRESENTED

1. Whether the Petitioners waived their argument concerning governmental entity liability under 42 U.S.C. § 1983 by failing to brief the issue of custom, policy or practice before the Maine Supreme Judicial Court?

2. Whether a claim of governmental entity liability under 42 U.S.C. § 1983 can be maintained when there has been a conclusive finding that constitutional violation occurred?

3. Whether an emergency response by a law enforcement officer requires "fast action" and a balancing of competing interests such that it is measured by the "intent to harm" standard for the purposes of substantive due process?

4. Whether the application of discretionary-function immunity under Maine statutory law gives rise to a claim under the Due Process or Just Compensation Clauses of the Fifth and Fourteenth Amendments to the United States Constitution?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF AUTHORITIES	iii
COUNTY RESPONDENTS' BRIEF IN OPPOSITION	1
STATEMENT OF THE CASE	2
REASONS FOR DENIAL OF THE WRIT	6
I. THE PETITIONERS HAVE NOT PRESERVED THEIR CIVIL RIGHTS CLAIMS AGAINST THE COUNTY RESPONDENTS SUCH THAT CERTIORARI REVIEW WOULD BE APPROPRIATE	6
II. THE PETITIONERS HAVE NOT ARTICULATED A LEGITIMATE BASIS FOR IMPOSING CIVIL RIGHTS LIABILITY ON THE COUNTY RESPONDENTS	9
III. THE MAINE SUPREME JUDICIAL COURT APPLIED THE CORRECT LEGAL STANDARD TO THE PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIM	10
IV. THE MAINE TORT CLAIMS ACT DOES NOT VIOLATE THE DUE PROCESS OR JUST COMPENSATION CLAUSES OF THE UNITED STATES CONSTITUTION	14
CONCLUSION	19

TABLE OF AUTHORITIES

Page

CASES

Board of Regents v. Roth, 408 U.S. 564 (1972) 15

City of Canton v. Harris, 489 U.S. 378 (1989) 7

City of Los Angeles v. Heller, 475 U.S. 796 (1986) 9

City of Springfield v. Kibbe, 480 U.S. 257 (1987) 6, 10

Corn v. City of Lauderdale Lakes, 95 F.3d 1066 (11th Cir. 1996) 17

County of Sacramento v. Lewis, 523 U.S. 833 (1998) 11, 12, 13

Evans v. Avery, 100 F.3d 1033 (1st Cir. 1996) 10

Fagan v. City of Vineland, 22 F.3d 1283 (3rd Cir. 1994) 10

Grimes v. Pearl River Valley Water Supply Dist., 930 F.2d 441 (5th Cir. 1991) 15, 16

Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982) 15, 16

Mark v. Borough of Hatboro, 51 F.3d 1137 (3d Cir. 1995) 10

Martinez v. State of California, 444 U.S. 277 (1980) 2, 15, 16

Palazzolo v. Rhode Island, 533 U.S. 606 (2001) 18

Parratt v. Taylor, 451 U.S. 527 (1981) 16

Pennsylvania Coal Co. v. Mahon, 260 U.S. 393 (1922) 16

Scott v. Greenville County, 716 F.2d 1409 (4th Cir. 1983) 17

Trigalet v. City of Tulsa, 239 F.3d 1150 (10th Cir. 2001) 9

TABLE OF AUTHORITIES – Continued

Page

STATUTES

42 U.S.C. § 1983 9

14 M.R.S.A. §§ 8101 to 8118 (2003) 14

COUNTY RESPONDENTS' BRIEF IN OPPOSITION

Respondents Cumberland County and Cumberland County Sheriff's Department ("the County Respondents") respectfully request that the Court deny the Petition for Writ of Certiorari seeking review of the Decision of the Maine Supreme Judicial Court issued on September 30, 2003, which is reproduced in Appendix A to the Petition at page 1a. The Petitioners mount a two-pronged assault on the Maine Supreme Judicial Court's decision, one that relates to a claim that was plead in the Complaint and one that exists outside the Complaint. As neither approach generates an issue worthy of review by this Court, the Court should reject the Petitioners' request.

The Petitioners waived their substantive due process claim against the County Respondents by failing to brief the issue on appeal. In any event, the Maine Supreme Judicial Court evaluated the Petitioners' substantive due process claim under the correct legal standard. Respondent Deborah Hall's emergency response to a call for assistance required her to make instant judgments in tense and uncertain circumstances. This Court has already held, in a similar context, that nothing short of an intent to harm on the part of a public official will give rise to liability under the rubric of substantive due process. Since there is nothing in the record below to suggest that Respondent Hall intended to harm the Petitioners' family members, the Maine Supreme Judicial Court properly upheld judgment in the Respondents' favor.

The Petitioners' alternative and unplead argument – that the Maine Tort Claims Act is unconstitutional – is unavailing. Assuming the argument was properly preserved

below, Maine's policy decisions about how to define the limits on state tort actions against governmental officials and entities are paramount to "any discernable federal interest." *Martinez v. State of California*, 444 U.S. 277, 282 (1980). The immunity provisions do not deprive the Petitioners of any property interest without due process, nor do they constitute a taking of property for public use without just compensation.

STATEMENT OF THE CASE

An automobile accident that occurred on July 8, 1998 in Raymond, Maine precipitated this litigation. That evening, Respondent Hall was operating a Cumberland County Sheriff's Department ("Department") cruiser in her capacity as a deputy sheriff. (Cumberland County and Cumberland County Sheriff's Department's Resp. Req. Admission ¶ 7 (hereinafter "CC Resp. Req. Admit. ¶ ___")). She received a call from Department dispatch indicating that she should proceed to an address in Casco to deal with an "out of control" six-year-old. (Dion Dep. Exh. 2). A supervisor also responded to the call. (Hall Dep. at 171, line 25, and 172, lines 1-2). Respondent Hall was told that a rescue unit would be "standing by." (Dion Dep. Exh. 2).

Based on her experience, Respondent Hall believed that the involvement of rescue indicated the possibility of personal injury. (Hall Dep. at 166, line 25, and 167, lines 1-9). In fact, she reasoned that rescue probably would not have known of the situation unless someone had called that department about some type of injury. *Id.* at 167, lines 20-25, and 168, line 1. Respondent Hall further understood that rescue was waiting for the Department to

secure the scene before it would respond to the potential injury. *Id.* at 169, lines 1-6.

Respondent Hall was familiar with the location of the call based on prior experience with one of the residents. *Id.* at 171, lines 20-23. She had been directly involved in at least four calls concerning this individual and was aware of a few others. *Id.* at 223, lines 19-21. On at least one occasion, the call involved a complaint of assault. *Id.* at 224, lines 4-6. Other calls involved disturbances and combativeness. *Id.* at 224, lines 16-18.

Overall, her knowledge and experience indicated that an emergency response was required:

> Q. Okay. In fact, you had no information to believe that there was personal injuries that had occurred at the scene, am I correct.
>
> A. Other than what I explained as to having a six-year-old child up at that time of night and knowing the name of the residence that I was going to and their past history and the fact that rescue was standing by and was not going to go to the residence until I arrived there along with the fact that the supervisor was also responding to the scene as well as myself as a second unit that led me to believe that there was much more to the story than a six-year-old that for some reason two parents can't control at 10:00 at night.

Id. at 171, lines 20-25, and 172, lines 1-4.

She started out from a convenience store in Windham headed toward Casco on Route 302. *Id.* at 157, lines 10-12. She was operating with lights and siren from the time she started out. *Id.* at 162, lines 4-10. She estimated her speed

in the 50-mph zone to be approximately 70 mph. *Id.* at 160, lines 10-17. She does not recall turning her siren off at any time. *Id.* at 162, lines 15-18.[1]

As Respondent Hall approached a dirt road that connected to Route 302, she heard her call number broadcast over the radio. (Hall Dep. at 180, lines 7-12). The cars in front of her all appeared to be moving to the right shoulder. *Id.* at 174, lines 8-13. She reached down to grasp a microphone that she had in her lap to respond to the call while she continued to watch the road. *Id.* at 180, lines 9-12. At this moment, she noticed one car cross in front of her path as she was passing. *Id.* at 174, lines 14-20. That was the Petitioners' vehicle. *Id.* at 174, lines 21-22. She applied her brakes and attempted to maneuver left. *Id.* at 176, lines 19-25. Despite these efforts, she struck the Petitioners' vehicle. *Id.* at 180, lines 23-25.

As of July 8, 1998, the Department had a field services manual that addressed the operation of vehicles. (Dion Dep. at 97, lines 1-4 & Exh. 4). The specific manual section on operation was part of a general order, which offers guidelines to assist officers in exercising their discretion:

> Unlike rules and regulations, a violation of a general order may result in administrative discipline. General orders constitute a guide to behavior in given situations. Deputies may depart from

[1] For the purposes of summary judgment, the Maine Superior Court and the Maine Supreme Judicial Court credited the Petitioners' allegations that Respondent Hall did not have her siren on in the moments before impact, and that her speed prior to impact was at least 86 miles per hour in a 55 mile per hour speed zone. (Appendix at 41-42 nn.7 & 8, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)).

> general orders if, in their professional judgment, the situation warrants. Deputies must be prepared, however, to justify their actions.

Id. Exh. 6 (¶ III(D)(2)).

The Petitioners presented no evidence on appeal of any deficiency in the training of patrol officers by the County Respondents. In their "statement of the case" to the Maine Supreme Judicial Court, the Petitioners did not even mention training by the County Respondents. (Brief of Appellants at 1-2, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)). Further, in the body of their substantive due process argument, the Petitioners did not refer even once to a custom, policy or practice of the County Respondents or to inadequate training. (Brief of Appellants at 21-24, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)).

The record does not justify the Petitioners' statement that Respondent Hall was traveling "in excess of 50 miles per hour over the posted speed limit," nor does it support the suggestion that Respondent Hall was not using her emergency lights during her response. Moreover, Respondent Hall was not told two minutes before the accident occurred that there was no emergency. (Appendix at 103, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)). In response to a query made to dispatch about injuries, she was informed that "[a]t this point we're only aware of the behavioral problem." (Appendix at 186, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)). This information from dispatch, along with the other information in her possession, did not suggest to Respondent Hall that an emergency response was inappropriate or unnecessary. (Appendix at 103, *Norton v. Hall*, 834 A.2d 928 (Me. 2003) (Hall Dep. at 171, lines 20-25, and 172, lines 1-4)). Quite the contrary was true. *Id.*

REASONS FOR DENIAL OF THE WRIT

The Petitioners have not articulated a viable basis for review by this Court. Assuming the claim against the County Respondents was properly preserved, the Maine Supreme Judicial Court applied the correct standard to the Petitioners' substantive due process claim against the Respondents. Absent a constitutional violation by Respondent Hall, there is no basis for civil rights liability against the County Respondents. By failing to address a broader conception of the County Respondents' liability in their briefs to the Maine Supreme Judicial Court, the Respondents have waived the argument. Finally, contrary to the Petitioners' suggestion, the Maine Tort Claims Act is not unconstitutional. The discretionary function immunity provisions of the Act – as interpreted by the Maine Supreme Judicial Court – define whatever property interest may exist in the Petitioners' tort cause of action. So defined, these provisions do not transgress the Due Process or Just Compensation Clauses of the Fifth and Fourteenth Amendments.

This Court should decline to issue a Writ of Certiorari.

I. THE PETITIONERS HAVE NOT PRESERVED THEIR CIVIL RIGHTS CLAIMS AGAINST THE COUNTY RESPONDENTS SUCH THAT CERTIORARI REVIEW WOULD BE APPROPRIATE.

This Court has consistently maintained that it would be improper to grant a writ of certiorari to review an issue that was not preserved below. For example, in *City of Springfield v. Kibbe*, 480 U.S. 257, 258 (1987) (per curiam), the Court discharged a writ of certiorari as improvidently granted on the grounds that the petitioner had

failed to interpose appropriate objections and subsequently failed to brief the relevant issues to the circuit court of appeals. In that context, the Court stated: "We ordinarily will not decide questions not raised or litigated in the lower courts." *Id.* at 259 (citing *California v. Taylor*, 353 U.S. 553, 556 n.2 (1957)). *See also City of Canton v. Harris*, 489 U.S. 378, 386 n.5 (1989) (declining to consider a claim of municipal custom that was not passed on by the circuit court of appeals).

The Petitioners failed to preserve the issue of whether the County Respondents maintained an unconstitutional custom, policy or practice related to supervision or training of officers. Upon a motion to dismiss filed by the County Respondents, the Maine Superior Court dismissed the Petitioners' civil rights claim against the County Respondents on the grounds that the Petitioners failed to allege the existence of an unconstitutional custom, policy or practice. (App. C at 34a). Thereafter, the issue of the County Respondents' civil rights liability was not addressed by the Maine Superior Court. (App. B at 23a n.2 (noting that the civil rights claim against the County Respondents had been dismissed)).

In their appeal to the Maine Supreme Judicial Court, the Petitioners failed to challenge the dismissal of the civil rights claim against the County Respondents. The Petitioners did not present any arguments to suggest that dismissal was improper, nor did they present any facts to establish the existence of *any* custom, policy or practice with regard to training or supervision – let alone a custom, policy or practice that reflected deliberate indifference.

The Petitioners' abandonment of their civil rights claim against the County Respondents is apparent from

the arguments that they made to the Maine Supreme Judicial Court. The Petitioners' only allusions to the County Respondents pertaining to civil rights claims were a general allegation that "the Defendants" violated the Petitioners' substantive due process rights and a suggestion that "it was error to grant summary judgment to the Defendants."[2] (Brief of Appellants at 21 and 23, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)). As the Petitioners' brief reflects, the general allegation was made in the context of arguing that the summary judgment order – which addressed the Petitioners' civil rights claim against Respondent Hall only – was based upon an erroneous legal standard. (Brief of Appellants at 21, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)). The Petitioners focused their argument entirely upon the actions of Respondent Hall. (Brief of Appellants at 22-23, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)). They did not once argue that the County Respondents were "deliberately indifferent" in the training or supervision of officers. (Brief of Appellants at 21, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)). They concluded their argument on the civil rights issue by stating: "On these facts, a jury could find that *Defendant Hall's* actions violated the Plaintiffs' Constitution rights." (Brief of Appellants at 23, *Norton v. Hall*, 834 A.2d 928 (Me. 2003)) (emphasis added).

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[2] The latter blanket statement deserves no comment since it is simply loose language based on an inaccurate premise: that the County Respondents were awarded summary judgment on this issue. As the Maine Superior Court's summary judgment decision and order reflects, summary judgment was granted to Respondent Hall only, as the civil rights claims against the County Respondents had already been dismissed. (App. B at 23a n.2 and 32a).

As the Petitioners did not preserve below the issue of municipal liability under 42 U.S.C. § 1983, this Court should decline to issue a writ of certiorari.

II. THE PETITIONERS HAVE NOT ARTICULATED A LEGITIMATE BASIS FOR IMPOSING CIVIL RIGHTS LIABILITY ON THE COUNTY RESPONDENTS.

Without waiving the preceding argument in this Opposition, the Court should refuse to grant certiorari review of the civil rights claim against the County Respondents because as a matter of law there was no evidence of a civil rights violation. As the County Respondents argue below, the Maine Supreme Judicial Court accurately applied the correct legal standard in assessing whether Respondent Hall's conduct amounted to a constitutional violation. *See infra* at 10. This Court has held that absent an underlying constitutional violation, there is no basis in which to hold a governmental entity liable: "If a person has suffered no constitutional injury at the hands of the individual police officer, the fact that the departmental regulations might have *authorized* the use of constitutionally excessive force is quite beside the point." *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (emphasis in original). The circuit courts of appeals have consistently applied this well-established principle of Section 1983 jurisprudence. *See Trigalet v. City of Tulsa*, 239 F.3d 1150, 1154-55 (10th Cir. 2001), *cert. denied*, 516 U.S. 932 (1995) (collecting cases from the United States Court of Appeals for the First, Fourth, Sixth, Seventh, Eighth, Ninth, and Eleventh Circuits).

The Petitioners' attempt to generate a controversy regarding this established doctrine of law is unavailing. First, the Petitioners never argued below that the County

Defendants' civil rights liability could or should be assessed without reference to whether Respondent Hall's actions violated due process, and their failure to do so constitutes a waiver. *See City of Springfield v. Kibbe*, 480 U.S. 257, 258 (1987) (per curiam). Second, the competing viewpoint – espoused by the United States Court of Appeals for the Third Circuit in *Fagan v. City of Vineland*, 22 F.3d 1283 (3rd Cir.), *on reh'g en banc*, 22 F.3d 1296 (1994) – is demonstrably incompatible with Supreme Court precedent because it fails to incorporate the distinction between the standard of municipal liability for failure to train and the predicative requirement of a constitutional violation. *See Evans v. Avery*, 100 F.3d 1033, 1039-40 (1st Cir. 1996) (rejecting the holding of *Fagan* because the panel "improperly applied the Supreme Court's precedent"). Moreover, *Fagan* is dubious authority even within the Third Circuit. *See Mark v. Borough of Hatboro*, 51 F.3d 1137, 1153 n.13 (3d Cir. 1995) (questioning the analysis contained in the *Fagan* panel opinion). Third, the record before the Maine Supreme Judicial Court does not support any claim for failure to train. There are simply no record facts upon which the Petitioners can argue that the County Respondents maintained a custom, policy or practice with regard to officer training that was both deliberately indifferent and the moving force behind a constitutional violation. For all of these reasons, the Court should refuse to issue a writ of certiorari.

III. THE MAINE SUPREME JUDICIAL COURT APPLIED THE CORRECT LEGAL STANDARD TO THE PETITIONERS' SUBSTANTIVE DUE PROCESS CLAIM.

Without waiving the preceding arguments in this Opposition, the Court should also decline to review the

Petitioners' substantive due process claim because the Maine Supreme Judicial Court applied the correct legal standard. In *County of Sacramento v. Lewis*, 523 U.S. 833, 854 (1998), this Court ruled that in the context of vehicle pursuits by law enforcement officers, a plaintiff would have to demonstrate an actual intent to injure to establish a substantive due process violation. The facts of *County of Sacramento* are similar to those in the instant case: The plaintiff in *County of Sacramento* was the estate of a young man who was riding on the back of a motorcycle that fled from two county deputies. The chase began because the motorcycle operator refused to stop for the deputies. The vehicles raced through a residential neighborhood for 75 seconds over the course of 1.3 miles, at times attaining speeds of up to 100 miles per hour. The pursuit ended tragically when the motorcycle tipped over and a pursuing cruiser, which was following at a distance of approximately 100 feet, hit the fallen vehicle.

The United States Court of Appeals for the Ninth Circuit vacated summary judgment for the pursuing officer. The Ninth Circuit concluded that the officer was not entitled to qualified immunity because the plaintiff generated an issue of fact as to whether the officer violated the Fourteenth Amendment by operating his vehicle in a deliberately indifferent manner. The Ninth Circuit noted that the officer violated department regulations pertaining to police pursuits in conducting the chase and emphasized that the officer was required to consider whether the risks presented in continuing the chase were justified in light of the danger presented by two youths who failed to stop for the officer.

This Court reversed the judgment of the Ninth Circuit and held as a matter of law that the plaintiff could not

establish a viable substantive due process claim. While the Court observed that the level of culpability necessary to raise an issue of fact might vary depending upon the type of action by the governmental official, it emphasized that "when unforeseen circumstances demand an officer's instant judgment, even precipitate recklessness fails to inch close enough to harmful purpose to spark the shock that implicates 'the large concerns of the governors and the governed.'" *Id.* at 853 (quoting *Daniels v. Williams*, 474 U.S. 327, 332 (1986)). The Court concluded by holding: "high-speed chases with no intent to harm suspects physically or to worsen their legal plight do not give rise to liability under the Fourteenth Amendment, redressible by an action under § 1983." *Id.* at 854.

Respondent Hall's alleged conduct in responding to the call for assistance does not meet the standard for liability set forth in *County of Sacramento*. There is no allegation in the Complaint concerning Respondent Hall's intent to harm. Moreover, Respondent Hall made a split-second decision about the necessary course of action in circumstances that she perceived to be an emergency. While the Petitioners continue to suggest that her decision was unwarranted, they cannot demonstrate a "harmful purpose" necessary to prove a substantive due process violation.[3] To paraphrase Justice Souter in *County of Sacramento*, regardless of whether Respondent Hall's

[3] Moreover, the Petitioners' suggestion that Respondent Hall was not confronted with an immediate need to act ignores the reality of the situation. While the Petitioners contend that Respondent Hall made a poor decision to start an emergency response, it is indisputable that she needed to exercise instant judgment.

behavior offended the reasonableness held up by tort law or the balance struck in the County's Standard Operating Procedures, it does not "shock the conscience" such that the Petitioners can recover damages pursuant to Section 1983.

The Petitioners' suggestion that a lesser level of culpability should apply to Respondent Hall's conduct is inconsistent with established law. In *County of Sacramento*, this Court was presented with variables that are similar to those in the instant case. While Respondent Hall was reacting to a call for assistance rather than a motorist who had failed to stop when signaled, she was motivated (like the officer in *County of Sacramento*) with the instinct to do her job. Her experience with the location of the call and the peculiarities of the call itself – the fact that a County officer would be brought in to deal with an "out of control" child, the hour of the call, the fact that rescue was standing by, and the fact that more than one officer was responding – led her to the instantaneous conclusion that immediate and rapid action was required. Moreover, like the accident involving the Petitioners and Respondent Hall, the accident at issue in *County of Sacramento* did not occur immediately after the officer began the operation of his vehicle – as the Ninth Circuit suggested, the officer in *County of Sacramento* had sufficient time during the pursuit to consider whether he should break off his pursuit. In short, the considerations in *County of Sacramento* are virtually identical to those in this case and the Maine Supreme Judicial Court properly applied the "shocks the conscience" standard.

IV. THE MAINE TORT CLAIMS ACT DOES NOT VIOLATE THE DUE PROCESS OR JUST COMPENSATION CLAUSES OF THE UNITED STATES CONSTITUTION.

Although the Petition lacks clarity on this point, it appears that the Petitioners are claiming that the Maine Tort Claims Act, 14 M.R.S.A. §§ 8101 to 8118 (2003), is unconstitutional. With regard to the County Respondents, it is doubtful whether the Petitioners preserved this issue below. Notably, the Petitioners did not base their opposition to the County Respondents' summary judgment motion on the ground that the discretionary-function immunity provision was unconstitutional. While the Petitioners did present some argument on this issue in response to Respondent Hall's summary judgment motion, the Maine Supreme Judicial Court did not find it necessary to address the issue.

Assuming (without admitting) that the Petitioners' argument was preserved below, it fails on its own merits. The Maine Tort Claims Act does not offend either procedural due process or the Just Compensation Clause.

A. To The Extent It Was Properly Preserved, The Petitioners' Procedural Due Process Argument Fails On Its Own Merits.

The Petitioners appear to argue that they have been deprived of their "causes of action" – presumably tort causes of action – because of the Maine Supreme Judicial Court's interpretation of the Maine Tort Claims Act. To make out a violation of procedural due process, the Petitioners would have to show that they were deprived of a constitutionally protected property interest without the

benefit of notice or an opportunity to be heard. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982). The Petitioners can demonstrate neither.

It is doubtful that they have a constitutionally-protected property interest in their tort actions. Property interests, in this context, are created and defined by state law. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). While this Court has held that causes of action can sometimes amount to a "property interest," it has also suggested that state law can define or delimit causes of action such that they do not acquire the status of an interest that is constitutionally protected. *See Martinez v. California*, 444 U.S. 277, 282 n.5 (1980). Other courts have expressly adopted this latter analysis. *See, e.g., Grimes v. Pearl River Valley Water Supply Dist.*, 930 F.2d 441, 444 (5th Cir. 1991). As Maine law does not permit tort claims against governmental entities or their employees for injuries arising out of discretionary acts, the Petitioners could not have a protected property interest in them. *See Grimes*, 930 F.2d at 444.

In any event, the Petitioners could not demonstrate that they were denied process due them. It may be true that the Maine Tort Claims Act prevents them from pursuing claims against the Respondents. However, as this Court has observed, legislative action by a state that affords immunity to governmental entities does not transgress the Due Process Clause:

> Whether one agrees or disagrees with California's decision to provide absolute immunity for parole officials in a case of this kind, one cannot deny that it rationally furthers a policy that reasonable lawmakers may favor. As federal judges, we have no authority to pass judgment on the

> wisdom of the underlying policy determination. We therefore find no merit in the contention that the State's immunity statute is unconstitutional when applied to defeat a tort claim arising under state law.

Martinez, 444 U.S. at 281-83. *See also Logan*, 455 U.S. at 432 ("Of course, the State remains free to create substantive defenses or immunities for use in adjudication – or to eliminate its statutorily created causes of action altogether – just as it can amend or terminate its welfare or employment programs.") (citing *Martinez*).

The Petitioners' reliance on *Parratt v. Taylor*, 451 U.S. 527 (1981) is misplaced. The Maine Tort Claims Act – the "state action" that the Petitioners maintain deprived them of their causes of action – does not represent a random and unauthorized action like the conduct at issue in *Parratt*. Rather, as *Martinez* and *Logan* indicate, it embodies a policy determination enacted into law through the legislative process that adjusts the contours of tort law in Maine. No further process is due: "[The plaintiffs] had plenty of opportunity to contest the sovereign immunity scheme during the legislative process. The legislature provided all the process that was due." *See Grimes*, 930 F.2d at 444 (citing *Logan*, 455 U.S. at 432-33).

B. To The Extent It Was Properly Preserved, The Petitioners' Just Compensation Argument Fails On Its Own Merits.

The Fifth Amendment is designed, in relevant part, to prevent inverse condemnation of "property interests" by the government without just compensation. *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Therefore,

the observations above as to whether causes of action that are barred by state law constitute protected "property interests" apply with equal force to a Just Compensation Clause issue. *See Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1075 (11th Cir. 1996) (observing that "property rights protected by the Fifth Amendment are created and defined by state law") (citing *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992)). In fact, courts have held that "property interests" in other contexts do not necessarily implicate the protections of the Just Compensation Clause. As the United States Court of Appeals for the Fourth Circuit has explained:

> While real property and other tangibles are commonly subject to "purchase" by the state as a means of compensation, other forms of property interests – though constitutionally protected – are not normally so conceived. Scott's entitlement to a permit is of this latter variety.

Scott v. Greenville County, 716 F.2d 1409, 1421 n.20 (4th Cir. 1983) (citing *Maher v. City of New Orleans*, 516 F.2d 1051, 1065 (5th Cir. 1975), *cert. denied*, 426 U.S. 905 (1976). *Accord Corn v. City of Lauderdale Lakes*, 95 F.3d 1066, 1075 & n.6 (11th Cir. 1996).

The Petitioners' property – tort causes of action – is not the type of interest that the Just Compensation Clause is designed to protect. The causes of action – which are inchoate interests that are not vested – are not amenable to sale or acquisition by a governmental entity like an interest in real property. Moreover, to suggest that a governmental entity is required to pay just compensation for such claims even though the entity is immune by state law is, in essence, to eviscerate the immunity itself. There is no authority for such a sweeping derogation of state law.

In addition, the calculus for determining when regulation goes "too far" for the purposes of the Just Compensation Clause is incompatible with the Petitioners' position. As this Court noted recently, the analysis of alleged "regulatory takings" involves "a complex of factors including the regulation's economic effect on the landowner, the extent to which the regulation interferes with reasonable investment-backed expectations, and the character of the government action." *Palazzolo v. Rhode Island*, 533 U.S. 606, 617 (2001). The Petitioners' just compensation argument is ill-suited for such an analysis for two reasons. First, tort claims are not the kind of property in which a person has any investment-backed expectations. Second, the character of the legislative action in this case was the regulation of tort claims under Maine law – and not the acquisition of property for public use. Given the significant public policy determination by the Maine Legislature to afford discretionary-function immunity, the Petitioners' interest in pursuing tort claims fails to generate a constitutional issue.

CONCLUSION

For the reasons discussed above, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

JOHN J. WALL, III, ESQ.
Counsel of Record for Respondents Cumberland County and Cumberland County Sheriff's Department

MONAGHAN LEAHY, LLP
95 Exchange Street
P.O. Box 7046
Portland, Maine 04112-7046
(207) 774-3906